*County of Hennepin v. Law Enforcement Labor Services, Inc., Local #19**

Responding to a prowler call shortly before midnight on July 29, 1991, two officers came across two thirteen year-old boys near the alleged crime scene.[1] The officers escorted the boys to the home of the Franzens, the parents of one boy, after the boys admitted that they had been on the premises. Later that same night, the police were informed of a prowler at the same household. Officer Fragodt, who had been on the earlier call and now suspected the boys, had the dispatcher phone the Franzen home. The dispatcher reached only the answering machine.[2]

Arriving at the Franzen home, Officers Fragodt and Roberts found a car parked out front with a warm engine. The front door was unlocked, with the interior doors open. The officers announced their presence from outside the house and from inside the kitchen; however, no one responded. The officers then made their way upstairs, where they came upon Mr. and Mrs. Franzen. The officers explained the events of the evening and said that they had come to speak to their son. The officers stated that the door was open and that they then decided to check and see if everything was all right. The officers confirmed that the boy was asleep and that his shoes were not damp. The officers apologized and left the premises.[3]

Subsequently, the Franzens filed a complaint in state court alleging violations of the Fourth Amendment. As a result of an internal police department investigation, the officers were suspended without pay for the constitutional violation. This suspension was mandated by police department rules and regulations providing that violations of the law are also violations of the departmental rules and regulations.[4] The officers' union appealed the decision, demanding arbitration as to whether there was just cause for the suspension.[5]

The arbitrator did not find any violation of the Franzens' Fourth Amendment rights; therefore, the arbitrator did not find just cause for the officers' suspension.[6] The County of Hennepin sought to vacate the arbitration award on the basis that the arbitrator exceeded his authority by ruling on a constitutional issue. The trial judge denied the County's motion. In turn, the court of appeals affirmed the decision of the trial court.[7] The

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* 527 N.W.2d 821 (Minn. 1995).

1 *See id.* at 823.

2 *See id.*

3 *See id.*

4 *See id.* at 824 n.1.

5 *See id.* at 824.

6 *See id.*

7 *See id.*

County appealed to the Supreme Court of Minnesota on the grounds that the arbitrator exceeded his authority. Thus, the question before the court was whether the arbitrator exceeded his authority in making a constitutional determination.

A number of principles concerning arbitration are well settled in Minnesota jurisprudence and were not disputed by the County. First, the scope of an arbitrator's authority is determined de novo by the reviewing court.[8] The challenging party bears the burden of persuasion in demonstrating that the authority was exceeded.[9] In order for the court to overturn an arbitrator's award, the evidence must establish that the arbitrator "clearly exceeded the powers granted to [him]."[10] Further, the arbitration agreement itself is to be interpreted as a matter of contract law.[11] The decision to overturn must not be based upon how the reviewing court would have ruled on the merits; rather, it should be based solely on the arbitration agreement.[12] None of these principles were contested; the position of the County was simply that arbitrators do not have the authority to make determinations on constitutional matters. The County, and ultimately the Supreme Court of Minnesota, relied upon the two following cases: *City of Richfield v. Local No. 1215, Int'l Ass'n of Fire Fighters*[13] and *McGrath v. Minnesota.*[14]

At the time of *Richfield*, Minnesota had in place a comprehensive Public Employment Labor Relations Act (PERLA), the primary purpose of which is the prevention of labor disputes.[15] In relevant part, PERLA provided the following:

> Any provision of any contract required by section 179.70, which of itself or in its implementation would be in violation or in conflict with any statute of the state of Minnesota or rule or regulation promulgated thereunder or provision of a municipal home rule charter or ordinance or resolution adopted thereto, or

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[8] *See id.* (citing Minnesota Educ. Ass'n v. Independent Sch. Dist. No. 495, 290 N.W.2d 627, 629 (Minn. 1980); State v. Berthiame, 259 N.W.2d 904, 909 (Minn. 1977)).

[9] *See id.* (citing Hilltop Constr., Inc. v. Lou Park Apartments, 324 N.W.2d 236, 239 (Minn. 1982)).

[10] *Id.*

[11] *See id.* (citing Ramsey County v. AFSCME, Local 8, 309 N.W.2d 785, 789-790 (Minn. 1981)).

[12] *See id.* (citing United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

[13] 276 N.W.2d 42 (Minn. 1979).

[14] 312 N.W.2d 438 (Minn. 1981).

[15] *See Richfield*, 276 N.W.2d at 48.

> rule of any state board or agency governing licensure or registration of an employee, provided such rule, regulation, home rule charter, ordinance, or resolution is not in conflict with sections 179.61 to 179.66 and shall be returned to the arbitrator for an amendment to make the provision consistent with the statute, rule, regulation, charter, ordinance or resolution.[16]

The *Richfield* court construed this subsection to require "parties to return to the arbitrators when a contract provision would violate or conflict with any Minnesota statute or rule, municipal home rule charter, ordinance or resolution, or a rule of any state board or agency governing licensure or registration of employees."[17] Noticeably absent from this enumeration is the Constitution. Accordingly, the court determined that the arbitrator "does not have authority to make determinations concerning the constitution."[18] This was the Minnesota Supreme Court's first indication that arbitrators do not have the authority to make constitutional determinations.[19]

Two years after the *Richfield* decision was handed down, the Supreme Court of Minnesota was again faced with the issue of whether constitutional issues are arbitrable. This time, however, the court was without the aid of a legislative enactment directing the court as to the scope of the arbitrator's authority. In *McGrath*, a number of security guards at a prison called in sick to protest the suspension of fellow guards resulting from the escape of an inmate.[20] The Department of Corrections found that the guards abused their sick privileges and therefore disciplined them. The disciplined guards filed a complaint alleging deprivation of their civil rights[21] and other

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[16] MINN. STAT. § 179.66(5) (1976) (repealed 1984).

[17] *Richfield*, 276 N.W.2d at 51.

[18] *Id.*

[19] *See Hennepin*, 527 N.W.2d at 824 ("We first indicated an arbitrator 'does not have the authority to make determinations concerning the constitution' in [*Richfield*]."); *see also McGrath*, 312 N.W.2d at 442 ("We have already indicated that arbitrators are without such authority in Minnesota.").

Note that the essence of the court's determination that arbitrators are without such authority was simply a matter of statutory interpretation, namely the doctrine of *expressio unius est exclusio alterius* (roughly translated, "the expression of one thing is the exclusion of another"). It has been stated that this doctrine "informs a court to exclude from operation those items not included in a list of elements that are given effect expressly by the statutory language." United States v. McQuilken, 78 F.3d 105, 108 (3rd Cir. 1996) (citations omitted).

[20] *See id.* at 439.

[21] Allegations of civil rights violations while acting under the color of state law implicates 42 U.S.C. § 1983 (1994), which provides in relevant part:

violations.[22] The trial judge dismissed the complaint, reasoning that the allegations were all within the scope of the collective bargaining agreement and that the guards had not exhausted their grievance procedure. The dispute was arbitrated, resulting in a finding that the prison guards abused their sick leave provisions. Thus, the discipline of the guards was for just cause.[23]

On appeal to the Supreme Court of Minnesota, the first issue facing the court was: "Did the trial court err in dismissing appellants' complaint for failure to exhaust the labor contract grievance procedures?"[24] As part of this inquiry, the Minnesota Supreme Court noted that it had already indicated that arbitrators in Minnesota are without the authority to decide constitutional issues.[25] Without discussion of *Richfield* or other analysis, the court expressly held that in Minnesota, arbitrators are without the authority to decide constitutional issues "irrespective of the language of the arbitration agreement."[26]

Justice Scott concurred with the result but wrote a separate opinion disagreeing with the majority's holding that an arbitrator may never make a constitutional determination.[27] In Justice Scott's view, the scope of the arbitration agreement should control whether the arbitrator may make such a determination. Justice Scott recognized the impact of the majority's holding and the advantages of arbitration. "When the state is a party to a labor contract, grievances are often raised as constitutional issues. To hold that arbitrators may never consider such issues would circumvent the public policy which favors arbitration and the speedy resolution of disputes without initial resort to litigation."[28] As such, Justice Scott would allow

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983 (1994).

[22] *McGrath*, 312 N.W.2d at 440.

[23] *See id.* at 441.

[24] *Id.*

[25] *See id.* at 442.

[26] *Id.*

[27] *See id.* at 442 (Scott, J., concurring).

[28] *Id.* (citing Layne Minnesota Co. v. Regents of Univ. of Minnesota, 123 N.W.2d 371 (1963)).

arbitrators "the authority to decide constitutional issues if the parties indicate such an intent . . . ."[29]

Against this legal background, the *Hennepin* court was faced with the issue of whether the arbitrator exceeded his authority in ruling that there was no violation of the Franzens' Fourth Amendment rights. The court noted that "[t]he *McGrath* decision further states, in unequivocal language, that . . . an arbitrator [may not] decide a constitutional issue."[30] The court reaffirmed the *Richfield* and *McGrath* decisions and again held "that in the public sector an arbitrator has no authority to make constitutional determinations, irrespective of the language of the arbitration agreement."[31] Accordingly, the arbitrator was without authority to make the Fourth Amendment determination.

Having decided that the arbitrator did not have the authority to decide the constitutional matter, the Fourth Amendment issue was to be decided by the courts. Since the trial court and court of appeals had examined the merits of the warrantless entry claim, the question was then properly before the Supreme Court of Minnesota for review. The court noted that under the Fourth Amendment of both the United States and Minnesota Constitutions, warrantless entries are presumptively unreasonable. Considering the emergency exception as justification for a warrantless entry (the theory relied upon below) the question became "whether the facts available to the officer at the moment she entered the home would lead a person of reasonable caution to believe that someone inside the home needed emergency assistance."[32] After reviewing the facts of cases upon which courts have allowed the exception[33] and the facts upon which the deputies

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[29] *Id.*

[30] *Hennepin*, 527 N.W.2d at 825.

[31] *Id.*

[32] *Id.* at 826 (citing State v. Othoudt, 482 N.W.2d 218, 223 (Minn. 1992)).

[33] *See generally* State v. Anderson, 388 N.W.2d 784 (Minn. App. 1986) (holding that officers were justified in their warrantless entry under the emergency exception when responding to a call from the mother of the potential victim that a man was "throwing people around and had grabbed a little girl" and finding the front room of the house littered with papers, clothing and toys); State v. Halla-Poe, 468 N.W.2d 570 (Minn. App. 1991) (holding that warrantless entry of police was justified under the emergency exception when responding to call of a good Samaritan who had taken a drunken woman home after seeing her swerve on the highway and was worried about her condition upon leaving her alone). *But see* United States v. Selberg, 630 F.2d 1292 (8th Cir. 1980) (holding that emergency exception did not justify the warrantless entry of police when called by a neighbor who was asked to watch a home while the residents were away, the front door of which he noticed was open).

based their entry,[34] the court noted that the latter "pale in comparison."[35] Accordingly, the court held that "the circumstances preceding the deputies' warrantless entry into the Franzen's [sic] home did not objectively demonstrate a person inside the home was in need of immediate assistance. Thus, exigent circumstances did not justify a warrantless search and the deputies violated the Fourth Amendment."[36]

Curiously, the *Hennepin* court limited the rule from *McGrath* that arbitrators may not make constitutional determinations by adding the language "in the public sector."[37] Neither the *McGrath* nor the *Richfield* decision contains such language.

In *Richfield*, the determination that the arbitrator lacked authority was based on the fact that the statute did not expressly authorize the arbitrator to make constitutional determinations. In *McGrath*, the court explicitly held that arbitrators were without the authority to make constitutional determinations, providing neither a policy nor statutory basis for doing so. In turn, *Hennepin* adopted the *McGrath* decision through the principle of stare decisis despite the fact that *McGrath* (through *Richfield*) was based on a statute that was repealed in 1984.[38] Absent a statutory basis for reaffirming the holdings, one would expect that the court would provide public policy arguments or some other rationale for their decision. However, the *Hennepin* decision contains no such support. Absent any real support, the *Hennepin* decision is unfounded judicial legislation, or worse yet, an attempt to thwart the role of arbitrators.

The reasoning in the *Hennepin* decision appears to conflict with the final holding. The *Hennepin* court stated that *McGrath* clearly stands for the proposition that arbitrators may not make constitutional determinations. In contrast, the *Hennepin* holding stated, "In the public sector, an arbitrator has no authority to make constitutional determinations . . . ." This

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[34] The deputies based their warrantless entry into the Franzen home on the following facts: 1) one unresolved prowler call had occurred, 2) a telephone call made shortly before the deputies arrived was answered by a machine, not a person, 3) the house was dark, 4) one of the several cars in the driveway was warm, 5) the temperature was about sixty degrees, the porch was unlocked, and the interior French doors were open, and 6) no one responded to their shouts and knocks.

Hennepin, 527 N.W.2d at 826. Curiously, the officers relied on the fact that there was a warm car in the driveway and yet the boys were only thirteen years old and on foot during the previous encounter. *See id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 825.

[38] *See supra* note 16 and accompanying text.

modification raises the question of whether arbitrators can make constitutional determinations outside the public sector. As written in *McGrath*, the answer is likely "no," whereas under *Hennepin*, the answer is at least "maybe."

Aside from the criticism of how the court arrived at its holding, the limitation of the rule to "the public sector" and the resulting ambiguity leads to serious concerns about constitutional determinations in the private sector. If there are public policy reasons for prohibiting arbitrators from making constitutional determinations, these reasons would likely apply with equal force in the private sector as well. Perhaps the Minnesota Supreme Court's limitation was unintentional. This ambiguity could result in lower courts in Minnesota permitting arbitrators to make constitutional determinations in private sector arbitrations. Because most constitutional violations occur in the public sector the limitation may be of little or no consequence.

However, it is still possible for constitutional issues to arise out of the private sector. For example, in *Shelley v. Kraemer*,[39] a racially restrictive covenant denied the Shelleys proper title to the residence they had purchased. The covenant, in and of itself, was not forbidden by the Equal Protection Clause of the Fourteenth Amendment because the agreement was between private parties. However, when one of the parties sought judicial enforcement of the covenant, there was sufficient state action. The Supreme Court held that the covenant was unenforceable, because it violated the Equal Protection Clause of the Fourteenth Amendment. As such, a purely private covenant resulted in a constitutional violation. Hence, if the title agreement had contained an arbitration clause, then an arbitrator would have been making a constitutional determination in a private sector arbitration.

The effect of the *Hennepin* decision has yet to be determined. Courts must still resolve the question of whether arbitrators in private sector arbitrations may make constitutional determinations.

Gregory A. Bauer

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[39] 334 U.S. 1 (1948).